

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW**

2013

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Editor

Office of the Legal Adviser
United States Department of State

Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2013. This volume provides a historical record of developments occurring during calendar year 2013, the first year of John F. Kerry's tenure as Secretary of State. The State Department is once again publishing the official version of the *Digest* exclusively on-line. By publishing the *Digest* on-line, we seek to make U.S. views on international law more quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

Significant developments in the sphere of arms control, disarmament, and nonproliferation led us to create a new chapter (Chapter 19) devoted to that subject in this year's *Digest*, separating the topic from the chapter on the use of force with which it has previously been combined. Among the 2013 developments covered in the new Chapter 19 are: the conclusion of a bilateral protocol with Russia allowing cooperative threat reduction activities in that country to continue; the conclusion of the Arms Trade Treaty; the commitment of Iran and the P5+1 to a Joint Plan of Action to address Iran's nuclear program; and the conclusion of a framework for the elimination of Syria's chemical weapons.

In 2013, the United States remained engaged in the development of international law by negotiating and concluding treaties and agreements. For example, in addition to the aforementioned Arms Trade Treaty, the United States joined other World Intellectual Property Organization members in adopting the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The United States signed several law enforcement-related agreements, including an extradition treaty with Chile, a mutual legal assistance treaty with Jordan, and asset sharing agreements with Andorra and Panama. The American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States signed an agreement on privileges, exemptions, and immunities. The United States signed a maritime boundary treaty with Kiribati and bilateral maritime law enforcement agreements with Palau, Marshall Islands, Kiribati, and Micronesia. In the area of environmental law, the United States participated in laying the groundwork for a new climate agreement at the 19th Conference of the Parties to the UN Framework Convention on Climate Change; became the first State to join the Minamata Convention to reduce mercury pollution; and concluded an agreement with the other Arctic States on cooperation in the event of an oil spill or related emergency. And the United States participated in ongoing negotiations on the Trans-Pacific Partnership trade agreement as well as launching negotiations on a Transatlantic Trade and Investment Partnership agreement.

U.S. government involvement in litigation and arbitration also contributed to the development of international law in 2013. The United States government filed briefs in the U.S. Supreme Court in several cases involving international law, including: *Bond v.*

United States, a case involving a challenge to the constitutionality of the federal criminal law implementing U.S. obligations under the Chemical Weapons Convention; *BG Group v. Argentina*, a case regarding judicial review of an arbitral award issued pursuant to a bilateral investment treaty; and *DaimlerChrysler v. Bauman*, regarding jurisdiction over foreign entities in U.S. courts. The United States also participated in a wide range of litigation matters at other levels, including cases challenging U.S. policy and practice regarding passports and visas, cases brought by law of war detainees and former detainees, and cases concerning foreign official immunity. State and federal courts issued a number of important decisions relating to international law or foreign policy, including: the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, regarding extraterritorial application of the Alien Tort Statute; the U.S. Courts of Appeals for the District of Columbia and Fourth Circuit determining that charges could be brought for aiding and abetting piracy and other acts not committed on the high seas, construing the international law definition of piracy; and several court decisions deferring to U.S. suggestions of immunity and statements of interest in cases involving foreign officials and heads of state. The United States also participated in important arbitral proceedings, including hearings in Case A/15(II:A) before the Iran U.S. Claims Tribunal. In proceedings brought under NAFTA chapter 11, an arbitral tribunal issued an award dismissing all claims brought by Apotex against the United States.

The United States filed periodic reports, responded to questions, and made presentations before treaty bodies regarding several international human rights treaties in 2013. In January, the United States was represented by a large delegation from multiple U.S. departments and agencies, including at the state level, before the Committee on the Rights of the Child regarding implementation of its obligations under two optional protocols to the Convention on the Rights of the Child. In June, the United States submitted its periodic report to the UN Committee on the Elimination of Racial Discrimination. In July, the United States filed its response to the Human Rights Committee's list of issues concerning the International Covenant on Civil and Political Rights. In August, the United States submitted its periodic report to the United Nations Committee Against Torture.

This year's *Digest* also discusses U.S. participation in, and support for, international organizations, institutions, and initiatives. The United States became the 59th member of the Council of Europe's European Commission for Democracy through Law, or Venice Commission, in 2013. The United States participated in the first universal session of the UN Environment Program ("UNEP") Governing Council in Nairobi, Kenya in February 2013, at which the Governing Council reformed the governance of UNEP in several key ways. The United States was involved in the launch of the International Code of Conduct for Private Security Service Providers Association and the "Montreux+5" conference following up on legal issues related to operations of private military and security companies during armed conflict. And, the United States continued to advocate for accountability for international crimes, including by expressing support for the International Criminal Court ("ICC") as its Assembly of State Parties reached consensus on amendments to the ICC procedural rules when confronted with the novel issue of trying a defendant who is also a sitting head-of-state; hailing the ruling by the Special Court for Sierra Leone upholding the conviction of Charles Taylor; and

welcoming the surrender of Bosco Ntaganda to the ICC for crimes in the Democratic Republic of the Congo.

The United States also took important unilateral actions in 2013 with international legal implications. For example, the U.S. government recognized a government of Somalia for the first time since 1991. The Executive branch developed policy guidance establishing a framework governing the use of force in counterterrorism operations outside the United States and areas of active hostilities. And, the United States continued to use various domestic economic sanctions programs to target proliferation, terrorism, human rights abuses, organized crime, and other behaviors that disrupt international security and peace.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2013 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, Kevin Baumert, David Buchholz, Violanda Botet, Jamie Briggs, Michael Coffee, David DeBartolo, David Gravallesse, Kathleen Hooke, Brian Israel, Kimberly Jackson, Jessica Karbowski, Emily Kimball, Richard Lahne, Jonas Lerman, Ollie Lewis, Michael Mattler, Stephen McCreary, Kathy Milton, Holly Moore, Andrew Neustaetter, Lorie Nierenberg, Phillip Riblett, Courtney Rusin, Tim Schnabel, Jesse Tampio, and Jeremy Weinberg. I express very special thanks to Joan Sherer, the Department's Senior Law Librarian, and to Anthony Stampone and Jerry Drake, from our bureau's records program, for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Mary E. McLeod
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Note from the Editor

Once again this year, the official version of the *Digest of United States Practice in International Law* for calendar year 2013 is being published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2013 volume diverges from the general organization and approach adopted in 2000 in one way. The content of what has previously been Chapter 18 has been divided into two chapters: Chapter 18 on Use of Force and Chapter 19 on Arms Control, Disarmament, and Nonproliferation. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through the middle of May 2014) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2014 where they relate to the discussion of developments in 2013.

Updates on most other 2013 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at www.state.gov/s/l/c8183.htm.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <http://www.un.org/en/documents/ods/>. For UN-related information generally, the UN's home page at www.un.org also remains a valuable source. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at www2.ohchr.org/english/bodies/hrcouncil. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at www.wto.org/english/docs_e/legal_e/legal_e.htm.

The U.S. Government Printing Office (“GPO”) provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at www.gpo.gov/fdsys, is GPO’s online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President’s transmittal of treaties to the Senate for advice and consent, with related materials), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at <http://www.state.gov/s/l/treaty> and the Library of Congress provides extensive treaty and other legislative resources at <http://beta.congress.gov/>.

The U.S. government’s official web portal is www.usa.gov, with links to government agencies and other sites; the State Department’s home page is www.state.gov.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:

www.cadc.uscourts.gov/bin/opinions/allopinions.asp;

U.S. Court of Appeals for the First Circuit:

<http://www.ca1.uscourts.gov/opinions/main.php>U.S. Court of Appeals for the

Second Circuit:

<http://www.ca2.uscourts.gov/decisions.html>;

U.S. Court of Appeals for the Third Circuit: <http://www.ca3.uscourts.gov/search-opinions>;

U.S. Court of Appeals for the Fourth Circuit:

<http://pacer.ca4.uscourts.gov/opinions/opinion.htm>;

U.S. Court of Appeals for the Fifth Circuit:

www.ca5.uscourts.gov/Opinions.aspx;

U.S. Court of Appeals for the Sixth Circuit:

www.ca6.uscourts.gov/opinions/opinion.php;

U.S. Court of Appeals for the Seventh Circuit:

<http://media.ca7.uscourts.gov/opinion.html>U.S. Court of Appeals for the Eighth Circuit:

www.ca8.uscourts.gov/all-opinions

U.S. Court of Appeals for the Ninth Circuit:

www.ca9.uscourts.gov/opinions/ (opinions) and

www.ca9.uscourts.gov/memoranda/ (memoranda and orders—unpublished dispositions);

U.S. Court of Appeals for the Tenth Circuit:

www.ca10.uscourts.gov/clerk/opinions.php;

U.S. Court of Appeals for the Eleventh Circuit:

www.ca11.uscourts.gov/opinions/index.php;

U.S. Court of Appeals for the Federal Circuit:

<http://www.cafc.uscourts.gov/opinions-orders/0/all>The official U.S. Supreme Court website is maintained at www.supremecourtus.gov . The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at www.justice.gov/osg.

Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service.

Some district courts post all of their opinions or certain notable opinions without requiring users to register for PACER first. For example, the U.S. District Court for the District of Columbia posts its opinions on its website at www.dcd.uscourts.gov/dcd. Other links to individual federal court websites are available at www.uscourts.gov/links.html.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon